Supreme Court, U.S.
FILED

95-331 AUG 25 1995

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ONE HUNDRED TWENTY-FOUR THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS ($124,813) IN UNITED STATES CURRENCY, *Petitioner*

Somnath Sivaskandan, *Claimant-Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN E. ACKERMAN
4515 Yoakum Blvd.
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Counsel for Petitioner

August 24, 1995

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QUESTIONS PRESENTED

1. Whether the lower courts incorrectly interpreted this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), by granting and affirming a summary judgment in favor of the United States.

2. Whether the forfeiture statute in this case, 31 U.S.C. § 5317 (c), was applied in a manner which violates the Fifth Amendment to the Constitution of the United States.

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The petitioner, Somnath Sivaskandan, individually, and as next friend and natural guardian of his daughter, Sandhya Sivaskandan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court for the Fifth Circuit, entered in this proceeding on May 30, 1995.

OPINION BELOW

The opinion of the United States Circuit Court for the Fifth Circuit may be found in the Appendix at page i.

JURISDICTION

The Judgment of the United States Circuit Court for the Fifth Circuit was entered on May 30, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. § 5316

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly –

(1) transports, is about to transport, or has transported monetary instruments of more than $10,000 at one time –

(B) to a place in the United States from or through a place outside the United States;

31 U.S.C. § 5317 (c)

(c) If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. . . .

STATEMENT OF THE CASE

Designations to the record in this petition are to the Appendix attached hereto.

On August 14, 1993, Veena Sivaskandan, a citizen of India, arrived in the United States at Intercontinental Airport Houston, Texas. While going through United States Customs, she failed to declare $124,813 in United States Currency that she was bringing into the United States. The money was seized by U.S. Customs. (App. p. viii)

On August 16, 1993, Veena Sivaskandan was arrested upon a warrant pursuant to 31 U.S.C. § 5316.

On February 10, 1994, Veena Sivaskandan was convicted of Bribery, pursuant to 18 U.S.C. § 201, Failure to Report Monetary Instruments, 31 U.S.C. § 5316 and False Statements, 18 U.S.C. § 1001, in the United States District Court for the Southern District of Texas.

On April 4, 1994, the United States of America filed its Complaint for Forfeiture in this matter. (App. p. ix)

On April 25, 1994, Somnath Sivaskandan, petitioner herein, on behalf of himself and his minor daughter Sandhya Sivaskandan filed an Answer to the Complaint for Forfeiture and Claim for Possession, in which he claimed that he was the lawful owner, by assignment and inheritance of $44,813 of the seized funds and that his daughter was the lawful owner through inheritance of $75,000 of the seized funds. (App. p. xii)

On September 1, 1994, the United States filed its Motion for Summary Judgment in the District Court. (App. p. xv) On September 28, 1994, Somnath Sivaskandan filed his Answer to the United States' Motion for Summary Judgment. (App. p. xvii)

On October 6, 1994, the Court entered its Final Judgment, granting Summary Judgment in favor of the Government and ordering that the seized funds be delivered to the Clerk of the District Court for payment of the fine assessed against Veena Sivaskandan in the criminal proceeding, *United States v. Sivaskandan*, Criminal No. H-93-233, in the United States District Court for the Southern District of Texas.

Notice of Appeal was filed by the petitioners herein on November 14, 1994.

The United States Circuit Court for the Fifth Circuit filed its opinion affirming the granting of summary judgment by the District Court on May 30, 1995.

In his Answer to the Government's Motion for Summary Judgment, Petitioner filed two documents from the State of India. (1) The Deed of Will of Mr. V.S. Sivaskandan, the now deceased father of Veena Sivaskandan and the petitioner, Somnath Sivaskandan, (App. p. xix) and, The Affidavit of Mrs. V.S. Rajalakshmi Sivaskandan, the mother of Veena Sivaskandan and Somnath Sivaskandan. (App. p. xx) Also attached to the Answer was the Affidavit of Somnath Sivaskandan, the Petitioner herein. (App. p. xxii)

The Affidavit of Somnath Sivaskandan showed that his father died testate on November 2, 1992. His sister, Veena Sivaskandan was specifically excluded from the will and inherited nothing thereby. Veena Sivaskandan, although having no ownership interest in any of the Estate of V.S. Sivaskandan, managed to persuade her mother, Mrs. V.S. Sivaskandan to allow her to withdraw certain cash and jewelry from the estate on the representation that she was going to bring it to the United States and deliver it to Somnath Sivaskandan, the owner pursuant to the provisions of the father's will. Somnath Sivaskandan, Petitioner, had no knowledge of this arrangement. It was only after the seizure of the money at Intercontinental Airport in Houston, Texas that the Petitioner learned that the money was from his father's estate and rightfully belonged to he and his daughter. (App. p. Viii)

The Deed of Will of Mr. V.S. Sivaskandan provides as follows:

> "5. I hereby explicitly exclude my only daughter Mis. Veena Sivaskandan from any benefit of whatever nature from all the assets as mentioned in this deed, as she had, ignoring the objections from me and my wife as her parents, eloped with one Mr. Chetan Kapoor who is not from our Community and thereby had caused shame to my family as well as to herself." (App. p. Xix)

The Affidavit of Mrs. V.S. Sivaskandan confirms that the money brought by Veena Sivaskandan to the United States was proceeds from the Estate of her late husband and was the property

of Petitioner, Somnath Sivaskandan and his daughter Sandhya Sivaskandan. (App. pp. xx and xxi)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING RULE 56(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), this Court established the standard for granting of Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Judgment should be granted unless the non-moving party makes a sufficient showing " . . . to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Ibid.*

Clearly the petitioner in this case established by documents and affidavits filed with the District Court that the seized funds belonged to him and his daughter, and that neither he nor his daughter had any knowledge of or complicity in their transport into the United States and his sister's failure to declare the same.

The Answer to Motion for Summary Judgment of Petitioner in the District Court, and the affidavits and documents attached thereto, established the "innocent owner" defense to forfeiture, and Petitioner was entitled to present this defense to a jury.

2. IT IS A VIOLATION OF THE DUE PROCESS AND TAKINGS CLAUSES UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE UNITED STATES GOVERNMENT TO FORFEIT MONEY BELONGING TO A PERSON WHOLLY INNOCENT OF ANY WRONGDOING.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), this Court opined that although innocent owners were essentially defenseless when the government sought to forfeit their property, there were exceptions. Conveyances have generally been seen as forfeitable regardless of the owner's innocence, since it is the conveyance that is the offender. Forfeiture can " . . . have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* At 688. This rationale does not, and should not apply, however, to currency. Currency cannot be seen as a fictional

offender. "It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Id.* At 689.

> " . . . the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Ibid.*

Clearly, Petitioner, in his affidavit in the District Court, established that the property had been taken from him without his privity or consent. The Government offered no evidence to the contrary. It is difficult to conceive of any actions the petitioner should have been expected to take or could reasonably have taken, to prevent his sister from stealing it and bringing it into the United States and failing to declare it. How could a brother and a niece be expected to foresee that their sister and aunt would likely steal their money from an estate and transport it into the United States without declaring it.

A forfeiture of these funds to the United States in this situation makes the United States, in effect, a party to a theft of money. The sister, Veena Sivaskandan, with no interest whatsoever in the money, stole the same from the estate of Petitioner's father, brought it into the United States and failed to declare it. Rather than putting itself in a position of one who caught the thief and prevented the loss, the United States in this case becomes an accessory to the theft by contending that it is entitled to the stolen funds.

Clearly this is not what Congress intended in enacting the forfeiture statute involved in this case. Such an enactment would be a clear violation of the Fifth Amendment.

The action of Veena Sivaskandan that triggered the forfeiture statute in this matter was not the bringing of the money from India to the United States. It was the failure to declare it. This was not contraband in the usual sense of that term. It was legitimate funds, earned by Petitioner's father over the course of his life, and left by the terms of his will to his son, the Petitioner, and his granddaughter. Petitioner has, by affidavit, made it clear that he

had no complicity whatsoever in his sister's failure to declare the money. In fact, he was not even aware until after the seizure that the money belonged to him. This is supported by his statement to Customs, when he came to pick up his sister, that he had no interest in the currency. (App. p. viii) It was only after talking to his sister that he learned of the theft and that the money belonged to him.

The Fifth Circuit, in its opinion, seems to suggest that it was incumbent upon Petitioner to somehow communicate to his sister that she should not steal his money, and if she should do so, and bring it to the United States, that she should not fail to declare it. How could someone be reasonably expected to foresee that such a communication would be necessary?

Congress has taken steps to protect private property rights from unwarranted forfeiture in connection with drug abuse prevention and control. *See,* 21 U.S.C. § 881(7). This section requires a showing of the knowledge or consent of the owner of property to the illegal activity before a forfeiture can be had. Under general constitutional principles of equal protection, it is incumbent that the same congressional statement of intent be applied to all forfeiture statutes and proceedings. The Fifth Circuit court, in this case has interpreted 31 U.S.C. § 5317 in a manner not consistent with congressional intent regarding forfeitures. The lower court only grudgingly recognized an innocent owner defense, and then by it opinion made it nearly impossible to establish the defense by requiring that the owner must foresee and take steps to prevent even bizarre circumstances which could result in forfeiture of his property.

The opinion of the Fifth Circuit in this case permits the government to embark on a wholly unwarranted invasion of private property rights secured by the Fifth Amendment. There can be no due process and no meaningful protection of private property if the owner can be required to foresee even unreasonable uses of his or her property and be required to take steps to prevent such unreasonable and unforeseen uses.

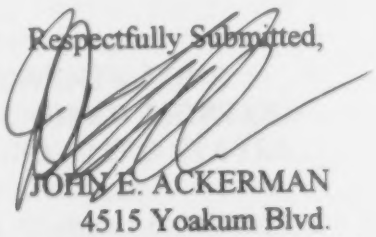
The Fifth Circuit would have required the Claimant-Petitioner herein to have foreseen that his sister would attempt to bribe a U.S. State Department official in Bombay, India; that she would have taken his money and his daughter's money to use for that purpose; that she would have transported it to the United States, and, finally;

that upon arrival in the United States she would fail to report the same to U.S. Customs. For this the Claimant-Petitioner would have required powers beyond even those of Nostradamus.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



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UNITED STATES OF AMERICA, *Respondent*

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APPENDIX

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UNITED STATES of America,
Plaintiff-Appellee
v.
ONE HUNDRED TWENTY-FOUR THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS ($124,813) IN UNITED STATES CURRENCY, Defendant

Somnath Sivaskandan, Claimant-Appellant

No. 94-20866
Summary Calendar

United States Court of Appeals,
Fifth Circuit

May 30, 1995

Appeal from the United States District Court for the Southern District of Texas.

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Claimant, Somnath Sivaskandan, appeals the district court's summary judgment in favor of the United States in this civil forfeiture suit. Finding no error, we affirm.

I. FACTS

On February 10, 1994, Veena Sivamani Sivaskandan, an Indian citizen, was convicted of several federal offenses arising out of her failure to declare $124,813.00 in U.S. currency to customs officials

when entering the United States, and her attempted bribery of a government official. On April 4, 1994, the United States commenced this action seeking forfeiture of the seized funds. The District Director of the United States Customs Service was designated as the substitute custodian of the currency during the pendency of the action.

Somnath Sivaskandan, Veena Sivaskandan's brother, individually and on behalf of his minor daughter, filed a claim for possession of the funds, asserting that he and his minor daughter were the lawful owners of the currency through assignment and inheritance, and that the funds were illegally seized. The United States moved for summary judgment and adduced evidence that there was probable cause to believe that the currency was subject to seizure and forfeiture under 31 U.S.C. § 5317(c) by virtue of Ms. Sivaskandan's failure to comply with the reporting requirements of § 5316(a) prior to transporting the currency into the United States.

According to the affidavit of a United States Customs Service agent, from May 19, 1993 through July 29, 1993, Ms. Sivaskandan repeatedly offered to pay a United States Foreign Service Officer $130,000 in exchange for the issuance of 30 U.S. Non-Immigrant Visas. Ms. Sivaskandan was told she would have to bring the money to Washington, D.C. to consummate the transaction. On August 14, 1993, Ms. Sivaskandan entered the United States through the Houston Intercontinental Airport. She told a senior customs inspector that she was not bringing more than $5,000.00 cash or negotiable monetary instruments into the United States and declared that she was carrying $500.00 only. A search of her bag revealed a small package containing $100 bills concealed in an inside suit pocket, and upon further inspection the inspector discovered twelve $10,000.00 bundles and other currency totalling [sic] $124,813. Ms. Sivaskandan was detained.

During an interview on the night of August 14, Ms. Sivaskandan advised Customs officials that the money belonged to her and represented proceeds from the sale of property and jewelry in India. She claimed that she was sleeping during the flight, but awakened during the video instructing passengers on how to fill out the monetary reporting forms, and obtained the forms from a flight attendant, but did not fill them out because the flight attendant did

not help her and she was exhausted. Ms. Sivaskandan admitted that she worked as a flight attendant for Pan Am for two years, and that she successfully completed airline training in Miami. She claimed, however, that she was not instructed about currency reporting requirements. Early the next morning when Ms. Sivaskandan's brother, the claimant, came to the customs office, he gave a statement to customs officials in which he denied any interest in the currency.

In opposition to the government's motion for summary judgment, and relying on *Calero-Toledo v. Pearson Yacht Leasing Co.*,[1] the claimant asserted that he was entitled to the currency because he was its innocent owner and was unaware of any illegal activity. In support of his "innocent owner" defense, the claimant submitted his deceased father's will, which disinherited Veena Sivaskandan, and an affidavit from the mother, a resident of Bombay, India, which stated, in pertinent part:

> After the demise of my husband the said Mr. V. S. Sivaskandan in November, 1992, A.D., and while my son [the claimant] was and still is in U.S.A. My only dauther [sic] [Veena Sivaskandan], aged now 31 years, and who was carrying on a business in travel agency in Bombay, induced me, taking advantage of the fact of my affection for her asher [sic] mother as well as my lack of exposure to the outer world experience to part with, periodically, all the jewels and other precious things which my husband kept in his cupboards as per his will and which legally belonged to by granddaughter . . . as per the will of my husband . . . all this happening over a period of six months from December, 1992 A.D. In August, 1993 A.D., [Sivaskandan] informed me that she was going to U.S.A. in connection with and to expand the business of travel agencies she was carrying on as on that date and thereby induced me to part with the cash . . . on an assurance that she would give the equivalent of the said cash . . . taken from me by her as well as the value of the jewels and other precious things taken by her

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[1] 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

from me periodically . . . to my son . . . as soon as she would successfully complete her business transactions in U.S.A.

In a judgment dated October 4, 1994, and entered October 6, 1994, the district court granted the government's motion for summary judgment. The district court determined that the funds were "in possession of Veena Sivaskandan for her use, irrespective of the ultimate obligation she may have had to repay her mother or to disburse them to her brother." On October 12th, the government moved the district court to reconsider and amend the final judgment. On November 14, 1994, the claimant filed a notice of appeal. By order dated November 28th and entered November 30th, the district court denied the motion to reconsider and amend.

II. DISCUSSION

[1] The United States argues that this court has no jurisdiction over this appeal. The government's position is that claimant's notice of appeal is a nullity because it was filed prior to the district court's disposition of the government's motion to reconsider and amend. This was the rule prior to the amendments to the Federal Rules of Appellate Procedure effective December 1, 1993. Under Fed.R.App.P. 4(a)(4), as amended, the claimant's notice of appeal is treated as merely dormant until the date the post-judgment motion is decided.[2] Thus, the government's position on this point is in error, and we will proceed to the merits of this appeal.

[2] This court reviews the granting of summary judgment *de novo*, applying the same criteria used by the district court in its initial determination of the issues.[3] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

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[2] *See Burt v. Ware*, 14 F.3d 256 (5th Cir. 1994).

[3] *MacMillan v. United States*, 46 F.3d 377, 380 (5th Cir. 1995).

law."[4] We review the evidence, "viewing the facts and inferences drawn from that evidence in the light most favorable to the nonmoving party."[5]

[3] 31 U.S.C. § 5316 requires that any person transporting monetary instruments worth more than $10,000 into the United States file a report containing certain information.[6] Section 5317(c) authorizes the Government to seize and obtain judicial forfeiture of monetary instruments not properly declared at the border in accordance with section 5316.[7] The Government bears "the initial burden of demonstrating the existence of probable cause to seize the violating currency."[8] Probable cause is the "reasonable ground for belief of guilt supported by less than *prima facie* evidence but more than mere suspicion"; it may be proved by circumstantial or hearsay evidence.[9] Once probable cause has been established, the burden of proof shifts to the claimant to prove a defense by the preponderance of the evidence.[10]

The claimant argues that the district court erred in granting summary judgment because genuine issues of material fact exist, including (1) whether the claimant and his daughter are innocent owners of the currency, (2) whether Ms. Sivaskandan had any ownership rights in the currency, and (3) whether the claimant or his daughter had any knowledge of, or assisted the efforts of, Ms. Sivaskandan's attempt to bring the currency into the United States without declaring it.

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[4] *Id.* (*citing* Fed.R.Civ.P. 56(c)).

[5] *Id.*

[6] 31 U.S.C. § 5316(a), (b).

[7] *United States v. $400,000 in U.S. Currency*, 831 F.2d 84, 86-87 (5th Cir. 1987.

[8] *Id.* At 87 (internal question and citation omitted).

[9] *Id.*

[10] *Id.* at 88

The claimant does not contest the district court's implicit determination that the Government had probable cause to seize the currency. Instead, the claimant argues that the currency should not be subjected to forfeiture because he and his minor daughter were in fact the "innocent owners" of the currency, relying *on Calero-Toledo v. Pearson Yacht Leasing Co.*[11]

As we have previously recognized, [12]in *Calero-Toledo*, the Supreme Court held constitutional a Puerto Rican forfeiture statute even though it did not exempt property of an owner who was neither involved in nor aware of the act of his lessee that resulted in the forfeiture. In fact, after *Calero-Toledo* there can be no doubt that Congress has the authority to provide for the forfeiture of an innocent party's property where such forfeiture serves a legitimate governmental purpose, such as deterring the type of illegal activity in which the property was involved. The Court noted that "[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[13] It could not be clearer, therefore, that *Calero-Toledo* did not create a general "innocent owner" defense to statutory forfeiture.

However, in dicta, the Court conceded that there could be circumstances under which the "broad sweep" of forfeiture statutes could give rise to serious constitutional questions. The court said:

> it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that

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[11] 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

[12] *See United States v. Eighty-three Rolex Watches*, 992 F.2d 508, 517 (5th Cir. 1993).

[13] *Calero-Toledo*, 416 U.S. at 687-88, 94 S.Ct. at 2094.

circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.[14]

At most, this language recognizes that there may be a subclass of innocent persons to whom forfeiture provisions could not be applied constitutionally. The burden of establishing that he is a member of that subclass rests with the claimant. In this case, Mr. Sivaskandan has not met that burden.

[4] It is insufficient to prove that he was in fact "innocent" or that he did not know about or aid in the illegal activity. It is also insufficient to prove that Veena Sivaskandan did not have ownership rights in the currency. The claimant would have had to produce evidence that the property had been taken from him without his privity or consent, or that he had done all that could reasonably be expected to prevent the proscribed use of the property to implicate the constitutional concerns the Supreme Court alluded to in *Calero-Toledo*. The claimant produced no such evidence.

Because the claimant did not establish the existence of a genuine issue of material fact, the district court did not err in granting the Government's motion for summary judgment.

III. CONCLUSION

For the reasons given above, the judgment of the district court is AFFIRMED.

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[14] *Calero-Toledo*, 416 U.S. at 688-90, 94 S.Ct. at 2094-95.

--Excerpt from Affidavit of Michael A. Montes, Special Agent, United States Customs

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On August 14, 1993, at approximately 5:10 p.m., Veena Sivamani SIVASKANDAN entered the United States at Houston Intercontinental Airport aboard Lufthansa Airlines, Flight 436, from Frankfurt, Germany. SIVASKANDAN was referred to Senior Customs Inspector Douglas B. Dickens for a secondary Customs examination because she declared $600 worth of gifts which she brought from Bombay, India. SCI Dickens asked SIVASKANDAN if she was bringing into the United States more than $5,000 in cash or negotiable monetary instruments. SIVASKANDAN responded by stating "NO". SCI Dickens asked SIVASKANDAN how much money she had brought into the United States, and she responded $500. SCI Dickens' inspection of SIVASKANDAN's bag revealed a small package concealed in the inside pocket of a suit coat. SCI Dickens found the package to contain $100 bills, in U.S. currency. The bills had been wrapped in newspaper, heat sealed in a clear plastic bag inside a pair of socks. SCI Dickens asked SIVASKANDAN how much money was in the package, SIVASKANDAN responded "$10,000". When SIVASKANDAN was asked if she had any more money, she stated "NO".

Further inspection by SCI Dickens of SIVASKANDAN's bags revealed a total of seven $10,000 bundles in coat pockets and five $10,000 bundles in soup boxes, plus miscellaneous currency for a total of $124,813. The currency was seized by SCI Dickens for the non-reporting of the currency in violation of Title 31 United States Code, Section 5316. This currency is now being held by the District Director, U.S. Customs Service, Houston, Texas, awaiting judgement [sic] of forfeiture from this court.

* * *

On August 15, 1993, at approximately 1:15 a.m., SA Mazzilli and Espinosa interviewed Somnath Sivaskandan, the claimant in this action, at Houston Intercontinental Airport. The interview revealed the following facts:

Somnath Sivaskandan stated the money Veena SIVASKANDAN was carrying was not his.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v. Civil Action No. H-94-1120

ONE HUNDRED TWENTY-FOUR THOUSAND EIGHT HUNDRED THIRTEEN DOLLARS ($124,813) IN UNITED STATES CURRENCY,
Defendant

COMPLAINT FOR FORFEITURE

1. The United States of America, plaintiff herein, complains of the captioned currency, defendant herein and for its cause of action for forfeiture thereof, states the following case:

2. Jurisdiction is proper in this Court pursuant to 28 U.S.C. Section 1345 and 1355, 19 U.S.C. Sections 1497 and 1610, and 31 U.S.C. Sections 5316 and 5317.

3. Venue is proper in this district as the defendant was seized on land at the Houston Intercontinental Airport within this district and is being held here pending judgment of the Court.

STATEMENT OF FACTS

4. On August 15, 1994, Veena Sivamani Sivaskandan, a 32 year old citizen of the Republic of India and former flight attendant for Pan American Airlines, was arrested at the Houston Intercontinental Airport by U.S. Customs officials for several offenses in violation of federal law. In her possession upon arrest was the defendant currency.

5. Sivaskandan had traveled the United States from India via Lufthansa Airlines flight 436 through Frankfurt, Germany. Upon arrival in Houston, she was referred to a U.S. Customs Service examination area, where she was asked if she was in possession of more than $10,000 in currency. She denied possession of any such amount, claiming that she only had $500 in cash. Customs officials then searched her hand bag, finding $10,000 in cash in $100 bills. A Customs officer then asked Sivaskandan if she had any additional currency. She denied possession of any more money. Further inspection of her other bags however, revealed the remainder of the defendant currency, totalling [sic] $124,813. Sivaskandan was then advised of her constitutional rights.

6. On February 10, 1994, Sivaskandan was found guilty by a jury in this Court in cause number H-93-233 of three felonious offenses. Count One, bribery of a U.S. Government official in violation of Title 18 U.S.C. Section 201(b) (1) (A); Count Two, the making of a false statement in violation of Title 18, United States Code, Section 1001; and Count Three, violation of the Currency Reporting Requirements of Title 31, U.S.C. Section 5316.

7. Sentencing for these offenses is scheduled for May 9, 1994.

8. By reason of its having been the subject of the violation contained in Count Three of the indictment, the defendant currency became liable for seizure and forfeiture pursuant to Title 31 U.S.C. Section 5317, and other statutes referenced herein.

9. Plaintiff commends the Motion for Substitute Custodian attached and requests that the Court order the District Director to notify all interested parties to file such a claim and answer as they may have to the allegations herein pursuant to Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims, made applicable to this action pursuant to 28 U.S.C. 2461(b). Plaintiff also asks that the Court order any such claimants to pay all the costs of seizure and forfeiture incurred by the Customs Service in addition to ordering the defendant currency forfeited to the United States, together with all costs of these proceedings in accordance with 19 U.S.C. 1608 and 1613.

ATTESTATION

10. Pursuant to Rule C(2) of the Supplemental Rules and 28 U.S.C. 1746, I solemnly swear and certify under penalty of perjury, that the foregoing Complaint for Forfeiture of $124,813 in United States Currency is true and correct to the best of my knowledge and belief based upon information officially transmitted to me by the United States Customs Service.

Signed at Houston, Texas this 4th day of April, 1994

Respectfully submitted
GAYNELLE GRIFFIN JONES
United States Attorney

BY: *Samuel G. Longoria*
Assistant United States Attorney
State Bar No. 12545500
440 Louisiana, Suite 800
Houston, Texas 77002
(713) 238-9509

[*Certificate of Service omitted*]

– Answer to Complaint for Forfeiture and Claim for Possession

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v. Civil Action No. H-94-1120

ONE HUNDRED TWENTY-FOUR
THOUSAND EIGHT HUNDRED
THIRTEEN DOLLARS ($124,813)
IN UNITED STATES CURRENCY,
Defendant

ANSWER TO COMPLAINT FOR
FORFEITURE AND CLAIM FOR
POSSESSION

COMES NOW SOMNATH SIVASKANDAN, individually, and as next friend and natural guardian of his daughter SANDHYA SIVASKANDAN, a minor child, by and through his attorney, John E. Ackerman, and files this his answer and claim to the Complaint for Forfeiture filed herein.

1. Claimant concedes that jurisdiction and venue are proper in this court.

2. Claimant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5, 6 and 7 of the Complaint.

3. Claimant denies the allegations contained in paragraph 8 and 9 of the Complaint.

CLAIM FOR POSSESSION

4. Claimant herein affirmatively alleges that he is entitled to possession of the $124,813 that is the subject matter of this action.

5. On October 5, 1993, Claimant filed a claim for the $124,813 which are the subject matter of this action with the United States Customs Service and deposited a bond in the total sum of $5,000. A copy of the claim and receipt for the bond are attached hereto as Exhibits A and B respectively and are incorporated herein as if fully set out and alleged.

6. Claimant is the lawful owner through assignment and inheritance of $44,813.00 individually and the lawful owner through inheritance of $75,000 on behalf of and as next friend and natural guardian of his daughter, SANDHYA SIVASKANDAN.

7. Claimant hereby demands restitution and in accordance therewith the right to defend this civil action.

AFFIRMATIVE DEFENSES

8. Claimant states by way of affirmative defense that the aforesaid property was not and is not subject to seizure or forfeiture pursuant to Title 31 U.S.C. Section 3516, 3517, Title 19 U.S.C. 1602-1619 or any other statute or regulation of the United States Government including all statutes and regulations referenced in the COMPLAINT FOR FORFEITURE filed herein in that the aforesaid property was unlawfully and illegally seized.

WHEREFORE, Claimant prays that the Court deny the relief prayed for by Plaintiff, that the Complaint for Forfeiture be denied, and that Claimant be entitled to costs of court, attorney's fees interest on the seized property from the date of seizure to the date of judgment at the maximum rate allowed by law, and such other and further relief to which he may be entitled, both individually and in his representative capacity.

Respectfully Submitted

John E. Ackerman
John E. Ackerman\
Attorney for Claimant
4515 Yoakum

Houston, TX 77007
(713) 237-9100
SBOT #00832500

VERIFICATION

I, Somnath Sivaskandan, declare under penalty of perjury, under the laws of the United States of America, that the facts set forth in the foregoing ANSWER TO COMPLAINT FOR FORFEITURE AND CLAIM FOR POSSESSION are true and correct to the best of by knowledge, information and belief.

Dated: April 19, 1994

Somnath Sivaskandan

[*notarial certificate, Exhibits and Certificate of Service omitted*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v. Civil Action No. H-94-1120

ONE HUNDRED TWENTY-FOUR
THOUSAND EIGHT HUNDRED
THIRTEEN DOLLARS ($124,813)
IN UNITED STATES CURRENCY,
Defendant

UNITED STATES MOTION FOR SUMMARY JUDGMENT

UNDISPUTED FACTS

1. The defendant currency was seized from Veena Sivaskandan, a citizen of the Republic of India, on or about August 14, 1993, within the confines of this district.

(Affidavit of Mike Montes, attached as Exhibit No. 1)

2. Ms. Sivaskandan was tried and convicted in this Court of the criminal offense of willfully failing to report the fact that she was in possession of the currency upon her entry into the United States in violation of 31 U.S.C. 5316.

3. Judgment of conviction was rendered against Veena Sivaskandan in the criminal case, which included fine and imprisonment.

4. Sonmath [sic] Sivaskandan has filed a verified claim in this action in which he seeks return of the currency.

5. Sonmath [sic] Sivaskandan has not presented any evidence to show that the defendant currency is his.

6. Sonmath [sic] Sivaskandan has not presented any evidence in contravention of the government's evidence, or that would serve as a legal defense to forfeiture of the currency.

7. The U.S. Customs Service interviews of Veena Sivaskandan and Sonmath [sic] Sivaskandan, conducted during the criminal investigation, indicate that the defendant currency was the property of Veena Sivaskandan, not Sonmath [sic] Sivaskandan, as claimed by him in this proceeding.

(Affidavit of Mike Montes, Exhibit No. 1, at pp 2 & 3)

8. Even after the defendant currency was seized from her by Customs officials, Veena Sivaskandan continued to make contact with a U.S. State Department official, James Waller, for the purpose of bribing him to commit corrupt conduct.

(Montes Affidavit, Exhibit 1, at page 3)

9. Sonmath [sic] Sivaskandan has claimed to have no knowledge of Veena Sivaskandan's corrupt activities prior to her arrest.

(Montes Affidavit, Exhibit 1, at page 4)

10. The evidence in the criminal trial of Veena Sivaskandan proves that she was intending to use the defendant currency for the purpose of bribing Mr. Waller of the U.S. State Department.

(Record in H-93-233 and Montes Affidavit, Exhibit 1, at page 4)

11. There is no evidence to show that Sonmath [sic] Sivaskandan ever owned the defendant currency beyond his verified claim in this action.

[*Argument, Conclusions of Law, Signatures and Exhibits omitted*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v. Civil Action No. H-94-1120

ONE HUNDRED TWENTY-FOUR
THOUSAND EIGHT HUNDRED
THIRTEEN DOLLARS ($124,813)
IN UNITED STATES CURRENCY,
Defendant

ANSWER TO UNITED STATES MOTION FOR SUMMARY JUDGMENT

COMES NOW SOMNATH SIVASKANDAN, individually, and as next friend and natural guardian of his daughter SANDHYA SIVASKANDAN, a minor child, by and through his attorney, John E. Ackerman, and files this his response to the Motion for Summary Judgment by the United States, filed herein.

1. The money that Veena Sivaskandan was bringing into the United States belonged to Somnath Sivaskandan and his daughter Sandhya Sivaskandan, a minor child. It came from the estate of V.S. Sivaskandan, the father of Somnath and Veena Sivaskandan. Attached hereto as Exhibit A, is a copy of the will of V.S. Sivaskandan. It is clear in paragraph five thereof, that Veena Sivaskandan was clearly excluded from the will because she

"eloped with one Mr. Chetan Kapoor who is not of our Community and thereby caused shame to my family as well as to herself."

2. The money brought to the United States by Veena Sivaskandan consisted of cash from the estate, which cash, by the terms of the will was to go to Somnath Sivaskandan, and the proceeds from the sale of jewelry, which by the terms of the will was to go to Sandhya Sivaskandan.

3. Thus, all the money that Veena Sivaskandan brought to the United States and failed to declare at U.S. Customs, was money belonging to totally innocent third parties.

4. Attached hereto as Exhibit B is the affidavit of Somnath Sivaskandan, essentially verifying the facts set out above.

5. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-89, 94 S.Ct. 2080, 2094-95 (1974), the Court recognized that forfeiture could not be had against innocent owners. All a claimant needs to show is that he was unaware of the illegal activity and that he had done all that could be reasonably expected to prevent the proscribed use of the property. Clearly, that was the case here.

[Signature, Certificate of Service and Exhibits omitted]

– Excerpt from Deed of Will of V.S. Sivaskandan

5. I hereby explicitly exclude my only daughter Mis. Veena Sivaskandan from any benefit of whatever nature from all the assets as mentioned in this deed, as she had, ignoring the objections from me and my wife as her parents, eloped with one Mr. Chetan Kapoor who is not from our Community and thereby had caused shame to my family as well as to herself.

– Excerpts from Affidavit of Mrs. V.S. Rajalakshmi Sivaskandan

3. My husband [V.S. Sivaskandan] died on 2.11.1992 A.D. [Nov. 2, 1992] leaving a will dt. 15.9.1992 A.D. [Sept. 15, 1992] by which, he had bequeathed to my only son the said Mr. V.S. Somnath Sivaskandan the total proceeds in cash kept in his cupboards amounting to Rs.36,00,000/-(Rupees thirty six lakhs only) realised [sic] from the disposal of the ancestral Property he inherited, in 1977 . . .

4. My Husband, the said late Mr. V.S. Sivaskandan had, bequeathed, through the will mentioned . . . all the jewels in gold amounting to approximately 300 sovereigns 38 kilograms of silver (approximately) in the form of utensils and 8.5 carats of diamonds all kept in his cupboards to by grand daughter, through my only son, the said Mr. V.S. Somnath Sivaskandan, Sow. V.S. Sandya Somnath and the same as per his bequeath to be kept in my safe custody in Bombay till such time when my son, the said Mr. V.S. Somnath Sivaskandan could take possession of the same as the "natural guardian" of his daughter . . . under the 'Hindu Minority and Guardianship [sic] Act 1956,':

5. After the demise of my husband the said Mr. V.S. Sivaskandan in November, 1992 A.D., and while my son, the said Mr. V.S. Somnath Sivaskandan was and still is in the U.S.A. My only dauther [sic] Miss. Veena Sivaskandan, aged now 31 years, and who was carrying on a business in travel agency in Bombay, induced me, taking advantage of the fact of my affection for her asher [sic] mother as well as my lack of exposure to the outer world experience to part with, periodically, all the jewels and other precious things which my husband had kept in his cupboards as per his will and which legally belonged to my grand daughter the said Miss. V.S. Sandya Somnath as per the will of my husband, except the diamonds of about 2.5 carats in value and approximately 10 sovereigns of gold, which I am wearing on my person as on date, all this happening over a period of six months from December, 1992 A.D. In August 1993 A.D., my daughter, the said Miss Veena Sivaskandan informed me that she was going to U.S.A. in connection with and to expand the business of travel agencies she was carrying on as on that date and thereby induced me to part with

the cash of Rs.36,00,000/- (Rupees Thirty Six Lakhs only) on an assurance that she would give the equivalent of the said cash, in U.S. Dollars, taken from me by her as well as the value of the jewels and other precious things taken by her from me periodically, in U.S. Dollars to my son the said Mr. V.S. Somnath Sivaskandan as soon as she would successfully complete her business transactions in U.S.A. And, beleaving [sic] the same, I parted with the said cash of Rs.36,000,000-/(Rupees Thirty six Lakhs only) by giving it to her on the mothely [sic] belief that the same, which legally belonged to my son the said Mr. V.S. Somnath Sivaskandan would be given to him, now, to my dismay, with dis-astrous [sic] consequences.

[*Signature and notary omitted*]

AFFIDAVIT OF SOMNATH SIVASKANDAN

SOMNATH SIVASKANDAN, being first duly sworn upon his oath, deposes and states as follows:

1. That he is the natural brother of Veena Sivaskandan.

2. That he is the son of Mr. V. S. Sivaskandan and Mrs. V. S. Rajalakshmi Sivaskandan.

3. That his father, Mr. V.S. Sivaskandan died testate on November 2, 1992. That my sister, Veena Sivaskandan was excluded from the will due to the embarrassment and shame she had brought upon the family by her elopement and marriage to Mr. Chetan Kapoor. She was to receive no part of my father's estate. See Exhibit AA, attached hereto, being the Deed of Will of my father V.S. Sivaskandan.

4. Prior to coming to the United States in August of 1993, Veena Sivaskandan was able to induce my mother, Mrs. V. S. Sivaskandan to turn over to her certain jewelry and cash belonging to my father's estate upon the representation that she would deliver it to me in the United States. This is the source of the money that was seized from Veena Sivaskandan by U.S. Customs officials in Houston, Texas on August 14, 1993. On Sunday, August 15, I learned from Veena Sivaskandan that the money was "family" money belonging to my father's estate. Upon closing of the estate that money would have come to me and to my daughter, Miss V. S. Sandya Somnath. See Exhibit BB, attached hereto, being the affidavit of my mother, Mrs. V.S. Rajalakshmi Sivaskandan.

[*Signature and notary omitted*]

(2)

Supreme Court, U.S.
FILED
OCT 26 1995

No. 95-331

In the Supreme Court of the United States

OCTOBER TERM, 1995

SOMNATH SIVASKANDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

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BEST AVAILABLE COPY

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QUESTIONS PRESENTED

1. Whether the district court erred in granting the government's motion for summary judgment.

2. Whether the forfeiture of property under 31 U.S.C. 5317(c) (1988 & Supp. V 1993) violated the Due Process and Takings Clauses of the Fifth Amendment based on petitioner's claim of innocent ownership.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-331

SOMNATH SIVASKANDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-vii) is reported at 53 F.3d 108.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1995. The petition for a writ of certiorari was filed on August 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner's sister, Veena Sivamani Sivaskandan, was convicted of bribery of a government official (18 U.S.C. 201(b)(1)(A)), making a false statement in a matter within the jurisdiction of an agency of the United States (18 U.S.C. 1001), and failing to file a report when transporting more than $10,000 in monetary instruments into the United States (31 U.S.C. 5316). Her offenses arose out of her failure to declare $124,813 in United States currency when entering the United States, and her attempted bribery of a government official. The government subsequently sought civil forfeiture of the $124,813. Petitioner claimed the funds. The district court granted the government's motion for summary judgment. The court of appeals affirmed. Pet. App. i-vii.

1. From May 19, 1993, through July 29, 1993, petitioner's sister, Veena Sivaskandan (Veena), repeatedly offered to pay United States Foreign Service Officer James Waller $130,000 in exchange for the issuance of 30 United States non-immigrant visas. Waller reported the contacts to his supervisor. At a meeting monitored by agents of the State Department's Diplomatic Security Service, Veena was told that she would have to bring the money to Washington, D.C., to complete the transaction. On August 14, 1993, she entered the United States at Houston Intercontinental Airport aboard a Lufthansa flight from Frankfurt, Germany. She told Senior Customs Inspector Douglas Dickens that she was not bringing more than $5,000 in cash or negotiable instruments into the United States and declared that she was

carrying only $500. A search of her bag revealed a small package containing $100 bills concealed in the inside pocket of a suit coat. Upon further examination of her bags, Dickens discovered 12 $10,000 bundles and other currency; the total amount was $124,813. Customs officials detained Veena. Pet. App. ii; C.A. R.E. 25-26. Early the next morning, petitioner came to the customs office and gave a statement to customs officials in which he denied any interest in the currency. Pet. App. iii; C.A. R.E. 27.

2. On April 4, 1994, the government filed a civil action seeking forfeiture of the $124,813. Petitioner, individually and on behalf of his minor daughter, filed a claim for possession of the funds. He asserted that he and his daughter were, through assignment and inheritance, the lawful owners of the currency, and that the funds had been illegally seized. The government moved for summary judgment and adduced evidence showing that there was probable cause to believe that the funds were subject to seizure under 31 U.S.C. 5317(c) (1988 & Supp. V 1993) because Veena had failed to comply with the reporting requirements of 31 U.S.C. 5316(a) before transporting the funds into the United States. Pet. App. ii.[1]

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[1] In pertinent part, Section 5316, which governs reporting on the exporting and importing of monetary instruments, provides that a person who knowingly transports monetary instruments of more than $10,000 at one time into the United States shall file, in a manner prescribed by the Secretary of the Treasury, a report on the money transported. See 31 U.S.C. 5316(a)(1)(B) and (b)(1)-(5). In pertinent part, Section 5317(c) provides for seizure and forfeiture of any monetary instruments for which a report required under Section 5316 is not filed. See 31 U.S.C. 5317(c) (1988 & Supp. V 1993). Unlike certain other forfeiture statutes, *e.g.*, 21 U.S.C. 881(a)(7),

Petitioner responded to the government's motion by claiming that he was the innocent owner of the currency and was unaware of any illegal activity. In support of his "innocent owner" defense, he submitted the will of his deceased father, which disinherited Veena, and an affidavit from his mother, a resident of Bombay, India. The affidavit asserted that Veena had persuaded her mother to give her, under assurance of repayment to petitioner, jewelry and cash that under the terms of the father's will legally belonged to petitioner's daughter. Pet. App. iii; C.A. R.E. 10-13, 16-19.

On October 6, 1994, the district court entered summary judgment for the government. It found that the funds were "in the possession of Veena Sivaskandan for her use, irrespective of the ultimate obligation she may have had to repay her mother or to disburse them to her brother." Pet. App. iv; C.A. R.E. 6. Thus, the district court held, "[t]he cash should be used to pay the fine assessed in [Veena's] parallel criminal action." C.A. R.E. 6

3. Petitioner appealed. Relying, *inter alia*, on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), he argued that the district court had erred in granting summary judgment because genuine issues of material fact existed concerning (1) whether petitioner and his daughter were innocent owners of the currency, (2) whether Veena had any ownership rights in the currency, and (3) whether petitioner and his daughter knew of or assisted Veena's effort to bring the funds into the United States without declaring them. See Pet. C.A. Br. 4-5.

Section 5317(c) does not provide for an "innocent owner" defense.

The court of appeals rejected petitioner's contentions. Pet. App. vi-vii. It noted that *Calero-Toledo* had not created a "general 'innocent owner' defense to statutory forfeiture," but had merely observed in dicta that in certain circumstances an innocent owner might be able to raise a constitutional defense to forfeiture, *e.g.*, where the property in question had been taken from the owner without his privity or consent, or where the owner was not only unaware of the underlying criminal activity, but had done everything that could reasonably be expected in order to prevent the use of his property in criminal activity. *Ibid.* (citing 416 U.S. at 687-690). The court of appeals stated that at most the Court in *Calero-Toledo* had recognized a possible "subclass of innocent persons to whom forfeiture provisions could not be applied constitutionally." Pet. App. vii. According to the court, petitioner bore the burden of establishing his membership in that subclass; petitioner, however, had not produced evidence that the money in question had been taken without his privity or consent, or that he had done all that could reasonably be expected to prevent the proscribed use of the property. *Ibid.* Thus, the court of appeals held, petitioner failed to establish the existence of a genuine issue of material fact with respect to his claim of innocent ownership, and the district court did not err in granting the government's motion for summary judgment. *Ibid.*

DISCUSSION

Petitioner makes two related arguments. First, he contends that in granting the government's motion for summary judgment the district court violated

Fed. R. Civ. P. 56(c)[2] and the standards for application of that Rule that were announced by this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). He argues that the district court erred in granting the government's motion for summary judgment because he had established that he was an "innocent owner" of the seized currency and therefore was entitled to present that claim to a jury. Pet. 10. Second, he argues that because he was "wholly innocent of any wrongdoing," *ibid.*, forfeiture of the seized money violated the Due Process and Takings Clauses of the Fifth Amendment. Pet. 10-13.

Applying the standard set forth in *Calero-Toledo*, the district court properly granted the government's motion for summary judgment, and the court of appeals properly affirmed. In *Calero-Toledo*, the Court stated that

> it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that

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[2] In pertinent part, Rule 56(c) provides that "[t]he judgment sought [on a motion for summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-690 (citations and footnote omitted). Here, both the district court and the Fifth Circuit determined that petitioner failed to produce evidence establishing that the money was taken without privity or consent, or that petitioner had done all that reasonably could be expected to prevent the money from being used for an illicit purpose. The affidavit from petitioner's mother plainly indicates that the money was not stolen, but was freely given to Veena with the understanding that Veena would repay petitioner.[3] Thus, the court of appeals properly held that petitioner did not present evidence creating a material issue of fact to be determined at trial. This straightforward application of the summary judgment standard, see Fed. R. Civ. P. 56(c), does not warrant review by this Court.

The propriety of the district court's grant of summary judgment, however, is also dependent on the resolution of petitioner's second argument, which appears to question the validity of the language from *Calero-Toledo* on which the district court and the court of appeals relied. Petitioner's claim that the forfeiture of his property violates the Due Process and Takings Clauses because he was wholly innocent of wrongdoing raises issues related to those pre-

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[3] The situation described in the affidavit is one in which forfeiture could "have the desirable effect of inducing [owners and bailors of property] to exercise greater care in transferring possession of the[] property." *Calero-Toledo*, 416 U.S. at 688. Thus, the instant case does not fall within *Calero-Toledo's* subclass of cases in which "it would be difficult to conclude that forfeiture served legitimate purposes." *Id.* at 689-690.

sented to this Court in *Bennis* v. *Michigan*, cert. granted, 115 S. Ct. 2272 (1995). *Bennis* presents the question whether the Due Process and Takings Clauses preclude a State from forfeiting a wife's interest in a car that her husband, a co-owner of the car, used in violation of state law, when the wife did not know that he would use it illegally. The decision in *Bennis* could affect the proper disposition of petitioner's Due Process and Takings claims. His petition therefore should be held pending this Court's resolution of *Bennis* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's resolution of *Bennis* v. *Michigan*, No. 94-8729, and then disposed of accordingly.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

OCTOBER 1995